United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-2381

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MICHAEL HOLODNAK,

Plaintiff-Appellee,

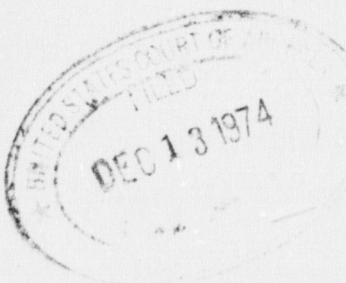
vs.

AVCO CORPORATION, AVCO-LYCOMING DIVISION, STRATFORD, CONNECTICUT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT-APPELLANT



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Statement of the Issues

1. Did the trial Court err in concluding that there was clear and substantial evidence of partiality on the part of the permanent arbitrator, Burton B. Turkus, particularly when the same Court, in passing on the cross motions for summary judgment, reviewed the same record of the arbitration proceeding as did the trial Court and found no evidence of bias, evident partiality or hostility by the arbitrator?

2. Did the trial Court err in disregarding the established policy of the courts to uphold arbitration awards when it entered a judgment vacating the permanent arbitrator's determination that Holodnak was discharged for just cause for violating General Plant Conduct Rule 19?

3. Did the trial Court err in concluding that there was "State Action" for the purpose of passing upon Holodnak's claim his First Amendment rights had been violated on the basis that a segment of one division of Avco, a private corporation, had business relationships with the Department of Defense?

4. Did the trial Court err in deciding that Holodnak's discharge for writing an article about Avco and the Union and their collectively bargained grievance process in violation of General Plant Conduct Rule 19 contravened his First Amendment rights and in deciding that Avco had breached its Collective Bargaining Agreement with the Union?

5. Did the trial Court err in deciding that the Union had breached its duty of fair representation on the theory that the attorney hired by the Union to represent Holodnak at the arbitration hearing had failed properly to represent him?

6. Was it error for the trial Court to award punitive damages in the absence of statutory or contractual authority and to assess them entirely against Avco when it had separately concluded such damages were unnecessary to deter Avco?

7. Did the Federal Arbitration Act Statute of Limitations bar this action, the complaint having been served on Avco more than three months after the date on which the Arbitration Award was filed?

Statement of the Case

On February 16, 1970, the plaintiff filed his complaint to vacate an arbitration award upholding his discharge by the defendant, Avco Corporation for violating Plant Conduct Rule 19 and for certain other relief, including reinstatement of his employment, damages and attorney's fees. On March 13, 1970 defendant Avco filed a motion to dismiss the complaint, and, on July 17, 1970, the Court (Zampano, J.) denied defendant Avco Corporation's motion to dismiss.[1] An answer was filed on behalf of defendant Avco Corporation in which the material allegations of the plaintiff's complaint were denied and three special defenses were pleaded, namely the complaint failed to state a claim upon which relief can be granted; the plaintiff's complaint is barred by the statute of limitations; and the award of the arbitrator being final and binding, it has the effect of a final judgment.

On June 4, 1973, cross motions for summary judgment were filed by the parties and they were referred to a Magistrate for purposes of reviewing the motions and record and of making recommendations to the Court. On October 10, 1973, the Court denied these motions.[2] The case was tried before the Hon. J. Edward Lumbard on April 29 and 30, 1974. The Court, on August 15, 1974, handed down its Memorandum of Decision in favor of the plaintiff except as to his prayer for reinstatement to Avco employment and thereafter, entered Judgment on September 19, 1974, and a Corrected Judgment on September 27,

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[1,2] It should be noted that the complaint against Russell Booth, the Union president, was dismissed, and summary judgment was granted in favor of William Ashlaw, an employee of the defendant, Avco Corporation.

1974. On October 17, 1974, the defendant Avco Corporation, filed its appeal.[3]

Statement of Facts

On November 18, 1969, Burton B. Turkus, the permanent arbitrator designated in the Collective Bargaining Agreement between Avco and the Union to hear and determine all disputed grievances, rendered an arbitration award against the plaintiff in which he found, "The proof establishes the just cause for the discharge of the grievant, Michael Holodnak, with conclusive finality." (*Ap. 565a).

Prior to May 15, 1969, Holodnak had written an article about Avco and the Union, called "Building a Union Local", which he caused to be published in the AIM Newsletter of May 15, 1969 (Ex. 4, Ap. 396a). Holodnak had shown a copy of the article to a number of Avco's employees at the plant (Ex. 8, Ap. 170a, 422a, 489a, 490a).

Holodnak received a written notice on May 28, 1969, at approximately 9:30 A.M., that he was to report to Avco's Labor Relations Office for a disciplinary hearing at 10:00 A.M. (Ex. 3, Ap. 395a). The disciplinary hearing simultaneously served as the second step of the grievance procedure in the event the employee or Union decided to contest the result. Step one is waived in discharge cases and the matter expedited thereby.

The Union shop steward, Frank Guida, and the Union committeeman, Joe Mezick, attended the hearing with

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[3] The defendant, Union, has not appealed.

* Ap. designates reference to page of Appendix. Ex. designates Exhibit.

Holodnak and represented him (Ap. 160a, 161a). William Ashlaw, representing Avco, showed Holodnak a copy of his article (Ex. 4), which had been published in the AIM Newsletter for May 15, 1969. Ashlaw informed Holodnak that the dissemination of the views contained in his article violated General Plant Conduct Rule 19. That rule provides:

> "The below-listed rules constitute prohibited conduct. Offenses under these rules may be cause for suspension or discharge . . ."
>
> "19. Making false, vicious or malicious statements concerning any employee or which affect the employee's relationship to his job, his supervisors or the Company's product, property, reputation or goodwill in the community." (Ex. 5, Ap. 398a).

The Collective Bargaining Agreement expressly contemplates the promulgation of rules of plant conduct: Article XVI, Section 4 (Ex. 2, Ap. 389a). The rules were prominently displayed at thirty-five locations throughout the Avco plant. Holodnak saw the Rules posted at the different locations in the plant and admits he was fully aware of them prior to his writing and publishing this article. He had been disciplined for violating them on a number of occasions (Ap. 198a, 199a, 200a, 201a, 320a).

At the disciplinary hearing of May 28, 1969, Ashlaw read aloud portions of the article which Holodnak had written. Ashlaw asked Holodnak whether he continued to subscribe to the views expressed in the article, and Holodnak said he did (Ap. 163a, 164a). He was accorded the opportunity to receive a reduced penalty if he would publicly deny his charges against the Company and the

judges and arbitrators and his advocacy of wildcat strikes. He declined to do so (Ap. 517a). The Union committeeman, Joe Mezick, also had requested the reduction in charge (Ap. 168a).

Holodnak said Ashlaw quoted several paragraphs from the article, indicated that it was slanderous, and that it violated Plant Conduct Rule 19. He remembered that Ashlaw was particularly upset over the reference in the article to the use of wildcat strikes (Ap. 164a, 166a).

Prior to his discharge, Holodnak had worked at Avco for about nine years as a tool and die maker and then as a small parts inspector (Ap. 150a). Because of a physical disability Avco had given Holodnak the easier job of parts inspector (Ap. 387a).

Holodnak was a member of Local 1010, UAW. He had been a shop steward for four years and was familiar with the labor agreement terms, including the grievance and arbitration procedure, and knew that the contract contained a no-strike clause and an arbitration provision (Ap. 151a, 204a, 222a). He knew that the no-strike clause of the contract prohibited wildcat strikes, but he told the Arbitrator that he assumed wildcat strikes were constitutionally legal, that there were circumstances which would warrant a wildcat strike, and he admitted that he advocated wildcat strikes in his articles (Ap. 208a, 209a, 222a, 224a, 225a). He also agreed he was fully aware of the serious view being taken of wildcats at the Avco Stratford plant in 1969, that there had been numerous proceedings and disciplinary cases and that the Arbitrator had even issued a cease and desist order directed and communicated to all employees (Ap. 597a).

Holodnak testified on direct examination at the trial that before his dismissal he had an unblemished employment record at Avco and that no disciplinary action had

ever been sustained against him (Ap. 154a). On cross examination, however, he admitted that he had in fact been disciplined on a number of occasions for violating the Avco General Plant Conduct Rules, and that his claim of a clean record was not correct (Ap. 198a, 589a-596a, 199a-204a, 205a).

Several members of Local Union 1010 testified at the trial concerning the processing of Michael Holodnak's grievance. Holodnak testified that the Union and its officers showed no hostility towards him at any step of the grievance procedure and the Union recommended that they proceed to step three of the grievance procedure immediately after Holodnak had been discharged. The Union vote to place his grievance in arbitration was unanimous (Ap. 233a-239a, 356a). While Holodnak testified at the trial that he did think that the arbitration was a fair one, he stated in regards to the Union that, "I said that I had no grievance against the Union. They processed my grievance fairly as far as it was under their control. When it went into the hands of an attorney, however, I found out after the arbitration hearing that I was not properly represented, because of subsequent information that I received indicated to me that the points of law that were brought out by Mr. Burstein were inappropriate to the case." (Ap. 246a).

However, at the arbitration proceeding, Holodnak testified that he was satisfied to have Union counsel represent him and that he felt that he had been properly represented at the arbitration hearing by counsel. He further testified that there hadn't been any pressure put on him to make those statements (Ap. 229a).

It was what Attorney George Johnson told him after the fact that led Holodnak to change his mind about Attorney Burstein's representation of him at the arbitration hearing (Ap. 26a). But, Attorney Johnson's testimony in

this proceeding is completely devoid of any charge that Attorney Burstein had failed fairly or properly to represent Holodnak. See Johnson Deposition (Ap. 566a). In point of fact, no qualified individual testified at the trial in support of Holodnak's bare after the fact suggestion that Attorney Burstein was guilty of malpractice, or failed to represent Holodnak properly. Mr. Burstein was deceased at the time this case came to trial (Ap. 633a).

The Union recording secretary in 1969 was Frank Gontarz. He testified at the trial (Ap. 362a, 363a) that he was present at the meeting when the Union officials decided to place Holodnak's grievance on the agenda for a third step hearing between the Union committeemen and Avco's Labor Relations Manager (Ap. 365a, 366a). The decision of the Union to go to the third step of the grievance procedure was unanimous (Ap. 366a). After reconsideration of the facts in the third step and after Avco reaffirmed its position that the discharge was proper and no ground for mitigation shown, the Union unanimously voted to appeal Holodnak's grievance to arbitration (Ap. 233a-239a, 366a). Holodnak requested that Attorney Edward Burstein, the Union Attorney, represent him at the arbitration proceeding (Ap. 368a).

Gontarz, who is no longer an Avco employee or an official of the Union, testified that he reviewed Holodnak's case with Attorney Burstein on the Monday prior to the arbitration hearing of July 17, 1969 (Ap. 370a, 371a). He said Burstein spent a good part of that day at the Union office (the Monday prior to the arbitration hearing) working on and learning the background of Holodnak's case. Burstein met with the whole shop committee and Gontarz and discussed the case with them. According to Gontarz, Burstein had also been at the Union office in connection with the Holodnak case on one or two other days. There was a copy of Holodnak's article in the file which Bur-

stein had reviewed at the Union office, prior to the arbitration proceeding (Ap. 371a, 372a), although the trial court indicates Burstein saw the article for the first time just prior to the hearing (Ap. 78a).

Russell R. Booth, the Union president, testified that he had discussed the matter with Attorney Burstein after receiving Holodnak's request to have an attorney represent him in the Arbitration hearing (Ap. 374a, 375a). The normal practice is for case presentation to be handled by a local Union official, however in this instance the Local Union agreed to pay Mr. Burstein to represent Holodnak (Ap. 359a, 360a). The Union president testified that when Mr. Burstein was given the assignment he was to pursue it with all dispatch. The Union position was that Holodnak should not have been terminated from Avco (Ap. 377a). The Union president testified that Mr. Burstein never showed any hostility toward Holodnak and never said anything against him (Ap. 377a).

The defendant, Avco Corporation, is incorporated in Delaware and is publicly owned. Its stock is traded on the New York Stock Exchange (Ap. 306a). A vice president of the Avco Corporation, Beverly H. Warren, and a chief executive officer of the Avco Lycoming Division of the Avco Corporation testified that the Avco Lycoming Division was one of Avco's operating divisions (Ap. 288a, 289a). In 1969, this Division operated two plants, one of which was owned by Avco Corporation and located in South Carolina, and the other of which was located in Stratford, Connecticut, and owned by the Government (Ap. 289a, 297a). The land of the Stratford plant, the buildings and most of the equipment, belong to the United States Government (Ap. 297a, 298a). During 1969, the Lycoming Division as a segment of Avco had from non-government business sales of approximately $28 million. In that particular year its Government contracts were substantially in excess of its non-government business.

In 1969, Avco's Lycoming Division manufactured gas turbine engines, reentry vehicles, nose cones for minuteman missles, and constant speed drives (Ap. 290a). These products were manufactured for the Army, Air Force and Navy (Ap. 290a). The defense department maintained personnel at the Stratford plant in 1969 in order to audit performance under and assure compliance with the contracts, cost and other standards (Ap. 301a, 302a).

According to Avco's 1969 Annual Report, at page 9 (Exhibit E) 85% of its business is commercial and non-government connected (Ap. 606a). Avco pays taxes to the Federal and State and Local Governments and pays the wages of its employees. It has no loans from the United States Government (Ap. 300a, 309a, 310a).

The award of the permanent arbitrator was filed on November 18, 1969, and Holodnak's notice of the motion to vacate the award was served on Avco on February 23, 1970 (Ap. 9a, 632a, Ex. H).

I.

A Court may not vacate the award of an Arbitrator and, in avoidance of the favored arbitration process, interpret the labor agreement's terms simply because it disagrees with part of the arbitration result.

We have the unfortunate feeling that we have been through an experience below best characterized as trial by tunnel vision. There was disregard of the prevailing public labor relations policy which favors arbitration as a means of dispute settlement; disregard of the factual context within which real life actions take place and against which they are measured; and disregard of

the plain meaning of words in collective bargaining contracts, in arbitration transcripts of record and in the decisions of the U. S. Supreme Court and of the Appellate Courts. The result, which is misfortunate for government contractors in general and for Avco in particular, is that the findings at least are askew and at worst went completely astray.

The problem now is one of focus, since the only point on which the lower Court, the Arbitrator and Avco agree is that plaintiff is not entitled to reinstatement.

Two mistaken premises underlie the decision below to vacate the arbitration award and to conclude the discharge was not for just cause, namely, (i) an arbitrator hearing a labor arbitration case may not examine a witness closely or about matters which might be adjudged irrelevant in a federal court; and (ii) a publicly-held corporation (such as the defendant Avco) can lose its legal identity and be deemed to be the alter ego of the government on the basis of the business relationship between one segment of one plant of one division "of [that] far flung conglomerate" (to use the Court's characterization) (Ap. 82a, 94a), and the Department of Defense. The Court builds the former into a finding of partiality sufficient in its opinion to warrant substitution of itself and its views for the process established through collective bargaining. It employs the latter to circumvent the obvious rule that "in private enterprise . . . the guarantees of the First Amendment do not apply . . ." (to quote the Court again at Ap. 98a, 91a, 92a) and to conclude the conduct of the plaintiff was constitutionally protected and *a fortiori* could not constitute just cause for discharge (Ap. 99a, 100a).

A. Partiality cannot be ascribed to the colloquy and award of the Permanent Arbitrator, who sought only to curtail illegal strikes and maintain the integrity of the no-strike and arbitration commitments in the labor agreement.

The lower Court erred in giving no more than perfunctory recognition to the lengthy and dismal history of illegal strikes by employees at the Avco Stratford Plant (Ap. 98a), to wit; ". . . wildcat strikes . . . were a problem at Stratford"). When this background of conduct highly disruptive and destructive of employee lives and business activities and of the Viet Nam conflict supply effort is taken into account, it becomes clear that the Permanent Arbitrator was sitting not merely as an *ad hoc* trier of a routine discharge grievance, but rather in the fashion of a court of equity conducting contempt hearings involving a scofflaw who has publicly advocated disobedience of the same court's decree.

In the four years ending in November of 1968, Avco was ". . . subjected to some 24 wildcat work stoppages and production interferences in violation of the labor agreement of the parties and the General Plant Conduct Rules, resulting in an incalculable loss and damage in money and production . . ."[1] This propensity for illicit work stoppages first received arbitral attention in 1966—prior to Mr. Turkus's appointment as Permanent Arbitrator—

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[1] *Avco Lycoming Division*, 51 LA 1228 (1968). Scrutiny of the full text of this published arbitration award by the same Permanent Arbitrator is most earnestly solicited. Herein, the Arbitrator recounts in detail his yeoman struggle (a struggle with which plaintiff was not unfamiliar—Ap. 209a, 597a) over the years to end wildcat strikes and to eliminate industrial strife through observance of the grievance procedures under the labor agreement at Avco.

when he sat as the Impartial Chairman of a Board of Arbitration which reviewed disciplinary suspensions imposed on fourteen such wildcat strikers at the Avco plant. The award of that initial Board recounts a "shocking series of similar work stoppages and interferences with operations" and finds just cause for the disciplinary action in the case of the fourteen 1966 grievants. *Avco-Lycoming Division,* 47 LA 644 (1966).

Despite the fact that the 1966 award had served notice on all bargaining unit employees that illegal strikes in violation of the labor agreement were a forbidden tactic and would be severely dealt with, the company and the union were again confronted with an illegal wildcat in November of 1967. This defiance of the spirit, if not the letter, of his earlier opinion constrained the by then Permanent Arbitrator to issue a cease and desist award directing all union members and officials thereafter to refrain from any violation of the no-strike provisions of the labor contract. The 1967 award recited the following stern warning:[2]

> "Breach or violation of the no-strike provision of the Agreement cannot be tolerated nor condoned. Indeed, it is difficult to envision any action or activity more likely to reduce a labor agreement to a worthless scrap of paper, to irreparably impair the parties' relationship, and more inimical to the economic best interests of Company, Union and workers alike, than indulgence in its violation. (Ap. 599a, Ex. B).
>
> * * *
>
> "Aside from the illegality thereof and the financial loss suffered by all concerned, it is manifest that

[2] The unpublished 1967 award is quoted in the Permanent Arbitrator's 1968 decision. See 51 LA 1228, 1230-1231, *supra* n.1.

> *those who incite, precipitate,* taking leading roles in, *or even participate in the proscribed strike action may well expose themselves to stern disciplinary action including discharge* and, in certain instances, to subject the Union itself to the assessment of damages to reimburse the Company for the losses sustained in consequence of the breach or violation of the no-strike provisions of the Contract. (emphasis added)" (Ap. 600a, Ex. B).

Unreconstructed, the militants at the Stratford plant subjected the employees, union, customers and company to more illegal wildcat strikes in June, 1968, *notwithstanding the unequivocal admonitions of the Permanent Arbitrator in both his 1966 and 1967 awards.* These 1968 stoppages brought on an expedited arbitration hearing and the issuance by the Permanent Arbitrator of a *second* Cease and Desist Order and Award on June 21, 1968 (Ap. 597a, Ex. B).

Twenty-two employees were thereafter discharged by Avco because of their participation as leaders in the illicit walkout. Grievances having been filed to challenge the 1968 discharges, additional hearings were held in another proceeding before the Permanent Arbitrator. His decision of November 29, 1968 reflects a thorough factual analysis of each individual case and upholds the terminations because of deliberate and flagrant breach of the no-strike clause, plant rules, and of the November 30, 1967 cease and desist award. In so ruling, the Permanent Arbitrator *sought to deter "an utter and irreparable collapse of work force morale and discipline" and to restore an atmosphere of respect for the grievance arbitration process, Avco Lycoming Division,* 51 LA 1228, 1232-1244 (1968), which after all is the principal bulwark against industrial strife.

So this is the context in which Holodnak's actions have to be read: a seemingly compulsive propensity of some employees at the Avco Stratford plant to lead and incite, and of others to follow, in repeatedly flaunting the no-strike and arbitration commitments of the Company-Union agreement, in taking matters into their own hands and in ignoring the orders of the Permanent Arbitrator restraining illegal strike action. If the Court had the right to review the merits—and that is open to question—it certainly had first to place itself in the shoes of the Company, the Union, and the Permanent Arbitrator on July 17, 1969 when the Holodnak discharge grievance came on to be heard.

Holodnak had written:

> ". . . The current course of moderation, charted by the Shop Committee, is alienating and frustrating the membership to no end."
>
> * * *
>
> ". . . But an aggressive union, one that stands up to the company and demands some equity in these decisions that affect us, will not only unite the membership, but can stop a move like that, as has been done in the 1930's *by sitdown strikes that successfully stopped General Motors* from its intended move out of an area. Of course the strategy in our case may not be identical, but *a positive stand,* on issues that concern out destiny, *must be taken.*
>
> * * *
>
> ". . . (the) members are again growing dissatisfied."
>
> ". . . Avco . . . has become sophisticated in its underhanded *union busting tactics* which run the gamut from sweet talk, giving special privileges to company oriented candidates (such as allowing them to

campaign) on company time, using rats (stool pigeons) . . . *buying off* whatever effective *opposition* may be left with foremanship."

". . . (the membership) is more militant toward the company than the leadership. Instead of suppressing this militancy, . . . the leadership should be channeling it into a *positive action.*

* * *

"It's probably true that wildcat strikes are not the answer, but wildcats wouldn't even be tempting if we had a good solid union that knows where it's at and that does not, through the grievance procedure, promise away our rights. *Yet it is comforting to have wildcats in our arsenal of weapons, just in case.*

* * *

". . . The company is above the law, (even the more naive realize this) and the *biased judges and arbitrators for all practical purposes belong to the company.*

"*The point is nothing has ever been accomplished by so called reasonable people.*"

"* * * *Uncompromising struggle* is what must continue—without let up . . ." (emphasis added) (Ap. 396a-397a).

There is more to the "context". Holodnak was a former union official, and as such knew the rules and the reason for and the terms of the cease and desist order (Ap. 151a, 204a, 222a), facts which were not lost on the employee group he was encouraging to action. It was clear and certain to the employees, to the Company and to the arbitrator that he was approving and applauding the previous proclivities of the militants toward illicit wildcat

strikes, and that in so doing he was inciting Avco employees, in defiance of the cease and desist orders of the Permanent Arbitrator, and flaunting the entire process of arbitration.

Words, to quote from Holmes, are the "skin of living thought, . . . (which) may vary greatly in color and content according to the circumstances and time." *Towne* v. *Eisner,* 245 U.S. 418, 425 (1918). *In Avco's circumstances,* and *at that time,* Holodnak's were nothing less than a call to industrial anarchy. That they may appear pallid to one unschooled in labor relations matters and removed five years in point of time is irrelevant.

This Court should not be deceived, as was the District Court by Holodnak's transparent declaration that wildcat strikes are "probably not the answer", especially since he concludes the next sentence with the assertion that it is "comforting to have wildcats in our arsenal of weapons, just in case". In case of what? In case Holodnak and his militant cohorts felt like it—to ascribe the plain and obvious meaning. In case "you have no out . . . you've got to do something," to put it in Holodnak's own words (Ap. 458a).

Are we to ignore the fact that Holodnak openly admitted holding the conviction at his termination hearing that wildcats are necessary?[3] Does that leave any doubt as to his intent and meaning? Is it permissible for a District Court several times removed from the conflict to conclude the whole thing was "rhetoric hyperbole?"

It was upon this advocacy by Holodnak of wildcat strikes and abuse of the arbitration process plus the disregard of the two prior cease and desist awards that the

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[3] See Transcript of Arbitration, Ap. 517a.

Permanent Arbitrator fastened his attention, as the arbitration transcript graphically reveals. With all deference to the commentary of the Court below, it was hardly Holodnak's political or economic philosophies which were the object of inquiry at the hearing. Rather, the central target of the Arbitrator's questioning of Holodnak, commencing at page 38 of the arbitration transcript and continuing throughout Holodnak's subsequent testimony, (Ap. 438a) was the relationship between Holodnak's article and the integrity of the no-strike and grievance arbitration provisions of the labor agreement. For example, we see the following:[4]

> "The Arbitrator: I can understand precisely what you're saying, that from that standpoint, the employees and the Union had a right to be concerned with destiny of the plant as to whether or not it remained in business or not. I can understand that. But in pointing that up what was the necessity of referring to a method of a sitdown strike which, I assume, was a strike during the course of the pendency of the labor agreement and during its duration?
>
> "The Witness: Well, this is the way these problems were resolved in those days. But this is not necessarily the way they have to be resolved today.
>
> "The Arbitrator: Right. Then why then did you make an allusion to an improper method of settling the problem, namely, by taking job action during the pendency of the contract; why did you suggest that in the article?
>
> "The Witness: Because that's the way it was done."

[4] Arbitration transcript, Ap. 454a.

And at pages 57-59 (Ap. 456a-458a) there appears this commentary:

> "The Arbitrator: Well, didn't you know, as a steward, that there's a no-strike, no-lockout provision in the contract?
>
> "The Witness: Yes, I did.
>
> "The Arbitrator: All right. Didn't you know, as a Union steward, that in the event that any employee under your aegis were even discussing the possibility of engaging in a work stoppage in violation of the contract that is was your duty to dissuade them from doing so; didn't you know that was your obligation?
>
> "The Witness: Yes, that's true.
>
> "The Arbitrator: Right. And that had been pointed out to you in an arbitration award back in the late '60's—.
>
> "The Witness: Right.
>
> "The Arbitrator: —late 1966-'67, correct?
>
> "The Witness: Right.
>
> "The Arbitrator: And didn't you know it was your obligation, as a shop steward, that in the event a wildcat stoppage did ensue, it was incumbent upon you to use every effort under your command to bring the employees back to work, indeed to lead them back to work; didn't you know that was your obligation?
>
> "The Witness: Yes.
>
> "The Arbitrator: Right. Now, in the light of that knowledge, I would like to know what you intended the readers of your article to understand by your concluding sentence, 'Yet it is comforting to have wildcats in our arsenal of weapons, just in case.' Just in case of what?
>
> "The Witness: Well, in case the grievance procedure is completely broken down.

> "The Arbitrator: But you didn't say 'just in case the grievance procedure is broken down.'
>
> "The Witness: Well, just in case—what other reason would I say 'just in case'?
>
> "The Arbitrator: That's what I want to know.
>
> "The Witness: Well, just in case you have no out, no way to resolve your problem, *you've got to do something.*" (emphasis added.)

A careful reading of the arbitration transcript proves that Holodnak's "political beliefs" were no part of the reason for the award sustaining Holodnak's discharge. The Permanent Arbitrator said:

> "Well, he has a perfect right to feel antagonistic toward the capitalistic system if that's his belief. What I am concerned with is whether or not he violated Article 19—." (Ap. 435a)

Moreover, in the colloquy ensuing immediately thereafter, the Permanent Arbitrator assisted Holodnak in articulating the point that Holodnak's political views had nothing whatever to do with his feelings about Avco; the purport of the exchanges is to disclaim any connection between political theory and the article which precipitated the discharge. If partiality shows here, it is *for* Holodnak's position. There is another explanation for the conversational exchange which is supportive of the foregoing and not in the alternative. Mitigation of penalty is commonly explored and very often accorded in circumstances indicating the grievant was either unaware of the consequences of his conduct, did not intend them or previously had a clean record. Much of the questioning by the arbitrator found by the lower Court to be irrelevant can and should be read to relate to such an investigation. Indeed it takes a strained reading to find it offensive, let alone partial. At the very worst it can be described as Sirica-

like—and so far as we know there is nothing wrong with trying to get at the truth. Of course, it turned out he did intend the consequences and he did not have a clean record (Ap. 204a, 205a, 517a, 589a).

In point of fact, forgetting context and emotion and real life for the moment, the decision of the Permanent Arbitrator to uphold the Holodnak discharge had to be motivated by more than a mere desire to defend the integrity of the prior cease and desist awards against a frontal attack; it was constrained by the national labor policy favoring the arbitration of labor disputes as a substitute for work stoppages. *Gateway Coal Co.* v. *United Mine Workers,* 414 U.S. 368 (1974); *United Steelworkers* v. *American Manufacturing Co.,* 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Corp.,* 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

In *Enterprise Wheel,*[5] the Supreme Court stated the federal judicial attitude toward the arbitration process:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. Citing *United Steel Workers* v. *Warrior & Gulf Navigation Corp.,* 363 U.S. 574, 585 (1960).

In *Gateway,* the Supreme Court recalled the basis for that policy, noting that commercial arbitration and labor arbitration have differing objectives; in the former, arbi-

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[5] 363 U.S. 593, *supra,* at 596 (1960).

tration takes the place of litigation, while in the latter, arbitration is "the substitute for industrial strife." 94 S. Ct., at p. 637. The Court went on in *Gateway* to quote from the Steelworkers Trilogy:[6]

> "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. *The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties objective in using the arbitration process is primarily to further their common goal of uninterrupted production* under the agreement, to make the agreement serve their specialized needs." (emphasis added)

The considerations alluded to in *Gateway* are particularly applicable at bar, since the references by the Court below to authorities in *commercial* arbitration cases are less than persuasive when as here, *industrial peace was at stake*. Certainly, from his years of experience with the problems and the industrial common law of the Avco

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[6] *United Steelworkers* v. *Warrior & Gulf Navigation Corp.*, 363 U.S. 574, 581 (1960).

Stratford plant, the Permanent Aribtrator was in a markedly better position than the Court below to evaluate the impact of the Holodnak article upon the "morale of the shop". Certainly too, he was better able to judge whether from its implications "tensions would be heightened or diminished". It seems almost ludicrous to characterize the evaluation which the Permanent Arbitrator made as evidence of "partiality" in light of prevailing case law, practice and the common sense meaning of words—but that's what happened.

In *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235 (1970), the Supreme Court held that Section 301(a) of the Labor Management Relations Act[7] empowers a federal court to enjoin violations of a contractual duty not to strike where a final and binding grievance-arbitration procedure exists as the *quid pro quo* for the no-strike obligation. Just as denial of equitable relief for breaches of no-strike obligations would carry "devastating implications for enforceability of arbitration agreements", so also would the Holodnak contempt of the prior cease and desist awards carry equally devastating implications to the continued viability of the arbitration procedure under the Avco Labor agreement. *Boys Markets, Inc.* v. *Retail Clerks, supra,* 398 U.S. at p. 247.

Advocacy of wildcat strikes constitutes, in and of itself, a disregard for the arbitration process which the fraternity of labor arbitrators has invariably condemned. The arbitrators uniformly close ranks and rightly hold that employees must follow the grievance procedure, rather than invoke self-help; they must obey orders and carry out their assignments, *after which* they may turn to the grievance procedure for ample relief when they believe

[7] 29 USC §185 (a).

a contract violation has occurred.[8] Holodnak as a former union steward[9] had a *special obligation* to uphold the no-strike clause and to set an example for other employees in honoring the arbitration procedures because by virtue of his former rank, he continues to hold the attention of many, is considered by his followers to be knowledgeable of law and contracts and obviously is more aware than most of the consequences of his acts. Advocacy of wildcat strikes in his published article was in flagrant disregard of that obligation, and was clearly cause for his termination. As Arbitrator Ralph T. Seward stated in *International Harvester Co.*, 14 LA 986, 988 (1950):

> "By virtue of his office, a Union steward or committeeman has a special obligation to observe the Agreement. It is his contractually recognized function to protect employees in the grievance procedure against violations of that Agreement by Man-

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[8] See Arbitrator Roberts in *Ingalls Shipbuilding*, 52 LA 221, 223 (1969); Teple in *Ohio Power Co.*, 50 LA 501, 504 (1967); Larkin in *Bliss & Laughlin Industries, Inc.*, 49 LA 231, 234 (1967); Duff in *Fruehauf Corp.*, 48 LA 485, 486 (1967); Wallen in *Hoague-Sprague Corp.*, 48 LA 19, 22 (1967); Dworkin in *Fruehauf Corp.*, 46 LA 15, 23 (1966); Boles in *Temco Aircraft Corp.*, 29 LA 693, 696 (1957); Howlett in *R. C. Allen Business Machines, Inc.*, 29 LA 404, 407 (1957); Updegraff in *John Deere Tractor Co.*, 5 LA 561, 563 (1946).

[9] See Transcript of Arbitration, Ap. 444a, where Holodnak relates his election to two terms as a steward and his later resignation of the post because of illness; see also Ap. 445a, where he admits knowledge of his duty to uphold the awards of the Arbitrator. Whether his resignation due to illness in midterm was known to the employees at Avco or whether it was assumed by those to whom he communicated his published views that he was completing his term of office in the normal fashion, is not of record here. It is of record, however, that Holodnak himself felt he had a special obligation because of his elected status.

agement. The Agreement gives him special rights and privileges in order that he may perform that function. He cannot with impunity turn his back on the very Agreement which it is his duty to defend."

The Permanent Arbitrator's action must not be judicially second-guessed—especially when viewed in the context of his long-standing labors to quell illegal strikes and to achieve the respect for the grievance procedure which is favored by the national policy of the *Steelworkers Trilogy* and *Boys Markets*. Far from evidencing partiality, the Holodnak award was the only conceivable result. The untenable alternative (Holodnak's directions were clear) was for the arbitrator to accept the breakdown of the grievance machinery and for Avco and the Union to accept the prospect of a future filled with industrial strife.

The failure on the part of the Court below to explore and understand the circumstances, the intent, and the attitude of the Permanent Arbitrator and the parmeters established as national policy for the Courts by the U.S. Supreme Court was compounded by an unwillingness to consider the quantum of proof it takes to vacate an arbitration award under the Federal Arbitration Act.[10]

The burden of proof when partiality or corruption on the part of a labor arbitrator is asserted rests with the party claiming it. *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F. 2d 1268, 1275 (2d Cir. 1971); *Saxis Steamship Co.* v. *Multiface International*, 375 F. 2d 577, 582 (2d Cir. 1967); *Bell Aerospace Co.* v. *Local 516*, 356 F. Supp. 354, 355 (W.D.N.Y. 1973).

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[10] 9 USC Section 10.

> ". . . an arbitration award should be upset only 'with great hesitation,' see *Karppinen, et al* v. *Karl Kiefer Machine Co.,* 187 F. 2d 32, 34 (2d Cir. 1951), *and then only where the party attacking it* ***clearly*** *establishes it on the grounds specified in Section 10.*" (emphasis added). *Catz American Co.* v. *Pearl Grange Fruit Exchange Inc.,* 292 F. Supp. 549, 551 (S. D. N. Y. 1968).

That the burden was not "clearly" sustained is evident from the fact finding of a Magistrate appointed by the Court below to act on cross motions for summary judgment filed by Holodnak and Avco. *He found after review of the exact same evidence,* including the arbitration transcript which was *considered by Judge Lumbard,* there was *no evidence of bias* or *evident partiality* or *hostility* of the arbitrator to Holodnak (Ap. 65a, 66a). *That finding was approved* as part of the order of the District Court entered *by Judge Zampano* then sitting, and disposing of motions (Ap. 62a).

The District Court specifically concluded in its written decision:

> As to the alleged bias, a question of partiality evident on the face of the arbitration hearing transcript, Cf. 9 U.S.C. 10(b), Ballantine Books, Inc. v. Capital Distributing Co., 302 F. 2d 17, 21 (2d Cir. 1962), the court is not persuaded that the Arbitrator displayed any hostility to plaintiff or predisposition to favor the company's stance; *as permanent arbitrator under the contract with prior experience of plant conditions, he did evince firm views concerning the efficacy of grievance proceedings and of the* Union's rule in pressing grievance claims, views apparently concurred in by plaintiff at the hearing

> in explaining portions of the Newsletter article, *but there is simply no evidence of a tendency to prejudge the merits of plaintiff's dismissal.* The significant aspect of the transcript is the narrow scope of inquiry stipuated to by counsel at the outset and *not the manner in which the Arbitrator conducted that inquiry.* (emphasis added) (Ap. 65a, 66a).

Holodnak's objectives in writing this article and the meticulous fashion in which the possibility of mitigation of penalty were reviewed at the arbitration hearing were apparent to Magistrate Latimer and Judge Zampano.[11]

Last, but not least, we should comment on the concern Judge Lumbard expressed over the Permanent Arbitrator's line of question of Holodnak. We understand it to be accepted law that an arbitrator, like a judge, is entitled to participate in questioning a witness. *Ballantine Books Inc.* v. *Capital Distributing Co.*, 302 F. 2d 17, 21 (2d Cir. 1962). In *Ballantine*, at 302 F. 2d 21, the Second Circuit Court of Appeals (Judge Lumbard sitting as Chief Judge, interestingly enough) stated in confirming an arbitration award in the face of a claim of "evident partiality," that "a judge is not wholly at the mercy of counsel and would be remiss if he did not participate to speed proceedings and eliminate irrelevance".

The Award should not have been vacated.

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[11]Holodnak was aware of the wildcat context, knew of the cease and desist orders (Ap. 597a), admitted he had no information at the time he wrote the article of union busting activities by the company (Ap. 486a), was unable to give any instances of Avco buying off opposition with a foremanship as charged (Ap. 219a, 220a), could not cite any example of arbitral bias (Ap. 479a), and would not have written the article knowing what he did on the date of the arbitration hearing (Ap. 228a, 502a). Holodnak even agreed that the hearing was fair and he was fairly represented (Ap. 551a).

B. The court below had no basis in law for concluding Avco Corporation is anything other than a private employer not subject to the First Amendment strictures and for assuming the role of labor management interpreter.

The District Court held that Holodnak's discharge was a breach of the collective bargaining agreement by Avco because it interfered with Holodnak's First Amendment rights. Yet it is hornbook law that the First Amendment limits or affects action undertaken by the government, not by private employers. Only when the action of private parties "becomes imbued with a governmental character, or when the Government significantly insinuates itself into the operative activities of private parties, "may their conduct be regarded as "state action" subject to constitutional restraints. *Buckley* v. *AFTRA*, 496 F. 2d 305, 309 (2d Cir. 1947). *NLRB* v. *Budd Mfg.*, 169 F. 2d 571, 577 (6th Cir. 1948), cert. denied 335 U.S. 908 (1949).

The Avco plant at Stratford, Connecticut is one plant of a two plant division of a Company which devotes only 15% of its total efforts towards satisfaction of the government's customer needs. Because that one plant devoted a major portion of *its* productive facilities to defense-related work, and because "nearly all the land, building, machinery and equipment" at that plant were government-owned, Judge Lumbard held "there was sufficient governmental action for the First Amendment to apply." (Ap. 94a.) This conclusion of law is not only in error, it is egregious in its misconception and is a compelling cause for reversal.

Constitutional doctrine does not support the application of First Amendment constraints against a private corporation operating a facility to which there is no ingress, resort, or access by the general public for a public pur-

pose. Nor, incidentally, does it permit Avco to assert special governmental status when the tax collector comes around, or a wage-hour claim is made, or an election petition is filed with the NLRB, or when it comes time to paying its employees, or to withhold and pay FICA taxes and so on.

In reaching his conclusion that Avco should be "constitutionalized" into a governmental presence, Judge Lumbard relied primarily on racial discrimination cases and, principal among those, upon *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). Analysis, and it doesn't even have to be especially close analysis, reveals that *Burton*, as well as its significant progenitors,[12] were limited on the facts to racial discrimination practiced in facilities *open to the public and provided by the government for the service of the general public* through a private lessee as operator. Further, it is implied in some and openly suggested in others, either that the state condoned the illegal racially discriminatory practices, or was privy to them. (Keep in mind this was the era of the doctrine of "interposition" and other imaginative, but unsuccessful attempts to subvert integration requirements.) Under such circumstances, it is understandable that the facilities were deemed subject to the due process and equal protection clauses of the Fourteenth Amendment.

Those decisions also teach us at the same time that title and land ownership, control, presence of governmental of-

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[12] *Muir* v. *Louisville Park Theatrical Association*, 347 U.S. 971 (1954); *Derrington* v. *Plummer*, 240 F.2d 922 (2d Cir. 1956), *cert. denied* 353 U.S. 924 (1967); *Jones* v. *Marva Theatres, Inc.*, 180 F. Supp. 49 (D. Md. 1960); *Nash* v. *Air Terminal Service, Inc.*, 85 F. Supp. 545 (E.D. Va. 1949). The Delaware Court in *Burton* discussed three of these cases; all are instances of racial discrimination raising policy objectives and constitutional currents of a character entirely dissimilar to the Holodnak situation.

ficials on the premises, and other circumstances *may be relevant,* but *without the vital "governmental" intention to make the facility generally "open to the public", the "private" operator cannot be burdened by a finding of "governmental presence",* for constitutional purposes.

In *Derrington,*[13] a private lessee of a cafeteria installed by a county in its court house, refused to provide service for Blacks, and the county was enjoined from maintaining the lease without taking measures in the future to end discrimination. In *Nash,*[14] suit was filed during the vitality of the separate—but—equal doctrine to require a private lessee of an airport restaurant, constructed and leased by the federal government, to extend its services to all classes of passengers. The District Court held that in the absence of provision for separate and equal facilities the lessee could not discriminatorily refuse service. Similarly, in *Muir,*[15] the Supreme Court reversed a judgment permitting discrimination by a private lessee of an amphitheatre where that open facility had been built by the municipality in a public park for the use of its citizens.

If anything emerges from these cases it is the common principle that functional equivalency to a place of public resort where conduct of operations on government land or premises is involved, is a *sine qua non* for a finding of

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[13] *Derrington* v. *Plummer,* 240 F. 2d 922 (5th Cir. 1956) *cert. denied* 353 U. S. 924 (1957).

[14] *Nash* v. *Air Terminal Service, Inc.,* 85 F. Supp. 545 (E. D. Va. 1949).

[15] *Muir* v. *Louisville Park Theatrical Ass'n.,* 347 U. S. 971 (1954). *Jones* v. *Marva Theatres, Inc.,* 180 F. Supp. 49 (D. Md., 1960) is substantially identical on the facts and in the result.

governmental action. And that is entirely consistent with the state action doctrine of the four landmark Supreme Court cases involving interference with First Amendment rights on premises owned by private entities.[16]

Under the rubric of these four decisions, the First Amendment is *not applicable* to proscribe private interference with speech in any form, whether picketing, handbilling or otherwise, *unless* the private entity displays, among other things, a functional equivalency to a governmental facility open generally to access by the public.

In *Marsh*,[17] the court protected Jehovah's Witnesses who sought to distribute literature on the premises of a company-owned town which the court considered to be the functional equivalent of any American town because its environs were freely used by the general public. Then, in *Logan Valley*, Justice Marshall's rationale in protecting union picketing in a shopping center was based upon the premise that "peaceful picketing carried on in a location open generally to the public is . . . protected by the First Amendment."[18] The *Logan Valley* opinion demonstrates the critical nature of the "open to the general public" element when it emphasizes this language from *Marsh*:

> "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the

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[16] *Lloyd Corp. Ltd.* v. *Tanner*, 407 U. S. 551 (1972); *Central Hardware Co.* v. *NLRB*, 407 U. S. 539 (1972); *Amalgamated Food Employees', Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968); *Marsh* v. *Alabama*, 326 U. S. 501 (1946).

[17] 326 U. S. at 502-503.

[18] 391 U. S. at p. 313.

statutory and constitutional rights of those who use it."[19]

Lloyd Corp. Ltd. v. *Tanner*[20] and *Central Hardware Co.* v. *NLRB*[21] presented tandem questions in the same category penetratingly analyzed earlier by *Marsh* and *Logan Valley*. In *Lloyd*, respondents had attempted to use shopping center premises to distribute handbills protesting the Viet Nam war; and in *Central Hardware* a union sought to use the parking lots of two hardware stores in a campaign to organize Central's employees. Decided on the same day, *Lloyd* and *Central* reconfirm the proposition laid down in *Marsh* and *Logan Valley* that the property involved in the operations of a private entity against which First Amendment restraint is sought to be imposed must be no less than the "functional equivalent" of public property *open to general public usage*. Indeed, these two cases not only echo this *Marsh* and *Logan* theme of general public access, but go further to impose additional conditions safeguarding the traditional rights of the private entrepeneur.[22]

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[19] 391 U. S. *supra*, at 325, quoting *Marsh* v. *Alabama*, 326 U. S. 501, 506 (1946).

[20] 407 U. S. 551 (1972).

[21] 407 U. S. 539 (1972).

[22] In *Lloyd*, the handbilling was deemed unprotected by the First Amendment even though conducted on open shopping center premises used by the general public because the handbilling was not "directly related in its purpose to the use to which the shopping center property was being put," and because there were "other reasonable opportunities for the handbillers to convey their message to their intended audience." 407 U. S. at p. 563-564.

(Footnote continued on following page)

Distilled, the foregoing means: before the crucial finding of "state action" may be made on the basis of the nature of operations at a particular facility used by a private corporation, it is necessary to show not only governmental regulation or ownership of the premises, but also that those premises are open to general public access.

No such proofs are present in the case at bar. The Avco Stratford plant is an activity of a purely private corporation. Some 85% of the corporation's business in 1969 was commercial, rather than defense-related. Beverly Warren, the Vice President and General Manager of the Avco Lycoming Division, testified without contradiction that at all relevant times Avco stock was publicly owned and traded on the New York Stock Exchange. He testified that the Avco Lycoming Division alone had $28,000,000.00 of commercial (non-government) sales in 1969 (Ap. 296a). He testified that the wages of the employees at Avco's Stratford plant were paid by Avco (Ap. 309a, 310a). The record is completely devoid of evidence that the premises of Avco's Stratford plant were or are open to the general public or utilized for any purpose whatsoever by any person not in the employ of this private employer. There is no evidence that the Avco Lycoming Division or the Stratford plant of that Division has any legal identity independent of Avco Corporation. In sum-

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(Footnote continued from preceding page)

Moreover, in *Central Hardware*, even though the parking lots were "open to the public" the court refused to permit "infringement of long-settled rights of private property" without a further determination on the record as a whole whether there were other reasonable means of communication with the employees available to the non-employee union organizers other than solicitation in the employer's lots. 407 U. S. at p. 547.

mary, the proofs below that Avco sold to the government and that the government was its landlord were no substitute for evidence that Avco opened that plant to some form of public access.

So much for the cases cited by Plaintiff and the Court below. As a matter of legal interest here, since it is our job to explore the subject as fully as possible, in those situations where the contention has been made that a private corporation should be deemed a governmental arm on grounds *other than* the character of its plant or operating premises, the law affords equally formidable barriers to First Amendment application.

Thus, in *Wahba* v. *New York University, et al.*, 492 F. 2d 96 (2d Cir. 1974) an unsuccessful attempt was made by a dismissed professor to cite the First Amendment against a private university on the basis that the research program in which he had been engaged was funded with federal dollars. This Court refused to identify government action, and said, with implications clearly pertinent (notwithstanding the offhand dismissal of *Wahba* by the Court below as "clearly" distinguishable) in the case *sub judice*:

> "As indicated in Powe v. Miles, supra, 407 F. 2d at 82-83 and Grafton v. Brooklyn Law School, 478 F. 2d 1137, 1141-1143 (2 Cir. 1973), *we do not find decisions dealing with one form of state involvement and a particular provision of the Bill of Rights at all determinative in passing upon claims concerning different forms of government involvement and other constitutional guarantees.*"
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> "This kind of arrangement, whereby federal funds are used to prime the pump of research effort in private scientific institutions which the Government

> could not perform as well . . . has social values too obvious to require elaboration . . . It is . . . clear that scientists . . . on the staffs of private institutions . . . are not likely to be willing to undertake projects under public grants if they are deprived of the freedom of management which they consider necessary and would have in projects not governmentally financed . . . Congress has specified one constitutional command, a prohibition of racial discrimination, which those engaging in federally financed projects must respect. This very specification affords some indication that the Government did not mean to require compliance with other constitutional guarantees; we do not think the Constitution imposes them *proprio vigore*." 492 F. 2d at p. 102.

The analogy to the private employer which the Government has asked to maintain a mobilization capability and to supply it with needed hardware is fairly obvious. Why the Court below should think it is unclear is the only thing which is unclear, in our view.

Of like import are the broadcaster cases, where private radio and television corporations have been targeted for First Amendment coverage by persons seeking access to the airwaves—the argument being that licensing and regulation by the F.C.C. are tantamount to a governmental presence. *All such arguments have been rejected. Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497 (1st Cir. 1950); and *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597 (3rd. Cir. 1945). The Third Circuit in *McIntire* wrote at page 601:

> "The plaintiffs seek to endow WPEN with the quality of an agency of the federal government and endeavor to employ a kind of 'trustee-of-public-in-

> terest' doctrine to that end. But Congress has not made WPEN an agency of government. For this court to adopt the view that it has such a status would be judicial legislation of the most obvious kind."

The First Circuit said, in *Hildreth & Rogers* (183 F. 2d at p. 501):

> "Plaintiff has argued that on the allegations of the complaint, it has a cause of action for the violation of its right to freedom of speech and freedom of religion under the First Amendment to the Constitution. *But this Amendment limits only the action of Congress or of agencies of the federal government* and not private corporations such as defendant here. *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia, supra,* 151 F. 2d at page 601." (emphasis added)

To suggest that Avco's military contracts alone constitute a significant governmental presence is to say that any private corporation which sells a substantial portion of its output at a single plant to the government is a party coming within the ambit of the First Amendment. This standard might be appealing—if for no other reason than its simplicity—except that if adopted, it would bring under the umbrella of the "governmental action" the majority of major manufacturing corporations in the United States. This Court may take judicial notice of the fact that great numbers of American corporations sell notable portions of their products as prime contractors to the government, or are significant vendors to others who are prime government contractors.

Such a standard of First Amendment coverage would convey, in essence, the meaning that *whenever* a private

entity engages in activities which ultimately benefit the public, that entity exhibits governmental presence; and thereby a multiplicity of activities heretofore considered to be outside the First Amendment would be constitutionalized. Would it not come down to a matter of degree requiring judicial analysis of each and every factual circumstance? (Is it 80% of one plant of one division of a conglomerate this time; 50% of one plant the next time; one department in that plant the time after that, and so on *ad nauseum* and *infinitum*). Would not physicians, lawyers, optometrists and shipbuilders sooner or later by judicial fiat become arms of the state?

The list of potential examples is endless, and we urge that *such a standard would utterly destroy the distinction between private and public action which has been fundamental to the operation of the First and Fourteenth Amendments since their adoption.*

We reach a point, of course, where verbal formulae or tests become self-defeating. Formulations of "significant governmental presence", "significant involvement", "significant action" and the like are convenient at the time in seeking to reach and correct what is regarded as socially undesirable conduct. This has been particularly true in the racial discrimination cases, some of which are discussed, *supra,* but such formulations must not be blindly applied in non-racial contexts where actions are privately conducted by private corporations. The operations of Avco's Stratford plant benefit the general public through its sales to the Department of Defense, we concede; but this concession is no warrant for equating a private employer with the federal government for constitutional purposes. For this reason alone, the judgment below must be reversed.

There is another reason directly related to this line of argument. As the lower Court states in its Memorandum

of Decision, "The First Amendment does not guarantee an absolute right of free speech." (Ap. 94a). The Supreme Court agrees. *Beauharnais* v. *Illinois*, 343 U.S. 250, 266 (1951). Next the case of *Pickering* v. *Bd. of Ed.*, 391 U.S. 563, 568 (1968), is cited approvingly by the lower Court as follows (Ap. 94a, 95a):

> "Concerning discharges of public employees the Supreme Court has held that the interest of the employee in free speech must be balanced against the employer's interest in job efficiency."

The application of the *Beauharnais* and *Pickering* principles to our facts leads inescapably to the conclusion that the scale's balance was on the side of employer interest in job continuity, or efficiency, if you will.

Context once again is of substantial import. 1969 was a time when the company was doing everything within its power to encourage law and order in the plant and the Permanent Arbitrator, acting in his quasi-judicial capacity, was carefully enunciating consistent, orderly standards of conduct in applying contract terms. The arbitration process was the last obstacle between renewal of the work stoppage tactic by plant militants and the continuation of the business and the employment of thousands. Holodnak held that process up to ridicule, charged the Arbitrator with bias and with having been bought off by the company, accused the company of various heinous crimes, including collusion with the union in subverting the grievance procedure, and approved resort to the contractually proscribed wildcat strike. See Ap. 208a, 209a, 210a, 211a, 221a, 262a, 263a.

Holodnak's brand of militancy had to represent a clear and present danger to the legal process and the orderly efficient conduct of business in accordance with the collective bargaining agreement in the eyes of those on the

scene five years ago. *Beauharnais* tells us of another reason for not according protection to Holodnak's writings, by the way. It stands for the proposition that the First Amendment does not protect libelous or false statements. Holodnak admitted both in arbitration and on trial that statements contained in his article were false (Ap. 209a, 210a), that there were errors (Ap. 228a), and that he knew of no support in fact for most of his allegations at the time he wrote the article, including the charge that the Permanent Arbitrator was biased and had been bought off by the company (Ap. 279a).

Arnett v. *Kennedy*, —— U.S. ——, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974) is also in point and instructive.

In *Arnett, supra,* (at 40 L. Ed. 2d, page 26) an employee was discharged for having violated a regulation of the OEO precluding conduct "which might result in or create the appearance of . . . affecting adversely the confidence of the public in the integrity of (OEO) the government" and forbidding employees "to engage in criminal, infamous, dishonest, immoral or notoriously disgraceful or other conduct prejudicial to the government."

The Supreme Court in upholding the discharge concluded that the standard was intended to authorize dismissal for speech as well as other conduct and that it did not offend the guarantees of the First Amendment. The Court said, at 40 L. Ed. 2d, pages 37-38:

> "At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the

> interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

The lower Court dismisses *Arnett* and a recent decision of the Eighth Circuit (*Birdwell* v. *Hazelwood School District,* 352 F. Supp. 613 (E. D. Mo., 1972), aff'd. 491 F.2d 490 (8th Cir. 1974) on the incredible basis that *Arnett's* teaching is limited to a case in which there is a specifically identified target of the false allegations, and that *Birdwell,* treating as it does of the "refined atmosphere of the classroom" is a special case and non-instructive in the "rough and tumble labor relations arena". (Ap. 96a).

Unhampered by *Arnett, Pickering, et al.,* the lower Court went on to hold that the "vituperatives" employed by Holodnak "could not have interfered with production at Avco" and there was no cause for discharge (Ap. 96a). The short answer to the "distinction" drawn by Judge Lumbard is that there was indeed a specific identified target of Holodnak's vituperatives and everyone knew who he was. There was only one arbitrator—Turkus—and he was permanent. So the allegation of bias and having been bought off by the Company meant "Turkus". Accordingly, *Arnett* governs even under the lower Court reading of its rule.

The misreading of authorities on First Amendment guarantees is compounded further by the District Court's use of them as a basis for intrusion into a fact finding and decision making area best left to the experts in labor relations.

If this Court agrees with us that the finding of partiality on the part of the Permanent Arbitrator was unsupported, and therefore, that the arbitration award should not have been vacated, the matter should be at an end be-

cause that was the only statutory basis adverted to by the Court below. If this Court feels constrained nevertheless to come to grips with the First Amendment issue we remind it that it will also have to deal with the scope and application which Judge Lumbard gave the principle:

He wrote

> "If Holodnak's dismissal infringed his First Amendment rights the Court must hold his discharge was without 'just cause' and Avco breached the collective bargaining agreement". (Ap. 91a)

At the risk of being accused of overkill, we note again that the relation of the Courts to arbitration was elucidated by the Supreme Court in the Steelworkers Triology, *supra,* page 21). These cases establish the following propositions: (1) the function of the Court is limited "to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract;"[23] (2) doubts as to the coverage of an arbitration clause should be resolved in favor of arbitration; and (3) an arbitrator's award which is based on the collective bargaining agreement must be enforced by the courts, even if his interpretation of the contract would differ from the court's or is ambiguous.[24]

The Court has found support for this deference to arbitration both in legislative history[25] and in Sections 201(b)

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[23] *United Steelworkers* v. *American Manufacturing Co.,* 363 U.S. 564, 568 (1960). In thus rejecting the right of the Court to decide the merits under the guise of arbitrability, the Court expressly reprobated *IAM* v. *Cuttler Hammer, Inc.,* 297 N.Y. 519, 74 N. E. 2d 464 (1947).

[24] *United Steelworkers* v. *Enterprise Wheel and Car Corp.,* 363 U. S. 593.

[25] See *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448 (1957).

and 203 (d) of the LMRA[26] which provide the final adjustment by an agreed-upon method is the desired procedure for settling contract disputes.

Notwithstanding this oft-reiterated posture of the Supreme Court toward labor arbitration and the employment of arbitral expertise in dispute settlement, the Court below entered the arena of contract interpretation and concluded Avco had breached the agreement. Since the analysis by the District Court of the parties' action was made without benefit of observation of witnesses and ability to determine credibility and without consideration of the efficacy, reasonableness and pervasiveness of the plant conduct rules, there was more than the substitution of one trier of facts for another; there was an invention of a new process which had the singular advantage of not being confused by relevant facts. There is no reason shown here for the Court below to have assumed such jurisdiction and there is substantial reason why it should not have done so.

Harry Schulman, former Dean and Sterling Professor of Law at Yale Law School, in his popularly cited, exhaustive analysis of the law of collective bargaining, expressed this thought with respect to the subject matter:

> "Arbitration may be resented by either party as an impairment of its authority or power. It is susceptible of use for buck-passing or face-saving. And it may sometimes encourage litigousness. But when the system works fairly well, its value is great."
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> * * *
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> "The courts cannot by occasional, sporadic decision, restore the parties' continuing relationship and

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[26] 29 U.S.C. §§ 171(b), 173(d).

their intervention in such cases may seriously affect the going systems of self-government."[27]

II.

Punitive damages and counsel fees should not have been awarded in a procedure instituted under the LMRA and the Arbitration Act.

The threshold question in considering the award of punitive damages to Plaintiff calls for a determination of whether they are available at all under LMRA Section 301. Neither 9 USC Section 10, nor 29 USC Section 185, make any provision for such awards. So far as we have been able to ascertain no Circuit Court of Appeals which has confronted the issue in a Section 301 action has found them to be proper or available.[28]

The Third Circuit decision in *United Shoe Workers* v. *Brooks Shoe Mfg. Co.*, 298 F. 2d 277 (3rd Cir. 1962) was written by Chief Judge Biggs. He reviewed the history of Section 301 and a portion of that review is worth reiterating here:

> It is the general policy of the federal labor laws, to which the federal courts are to look for guidance in Section 301 actions, to supply remedies rather than punishments. This was indicated by the Supreme

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[27] Schulman, *Reason, Contract and Law of Labor Relations*, 68 Harv. L. Rev. 1000, 1024 (1955).

[28] See *Dill* v. *Greyhound Corp.*, 435 F.2d 231, 239 (6th Cir. 1970); *Williams* v. *Pacific Maritime Assn.*, 421 F.2d 1287 (9th Cir. 1970); *United Shoe Workers* v. *Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3rd Cir. 1962).

> Court in Republic Steel Corp. v. N.L.R.B., 311 U.S. 7, 10-13, 61 S. Ct. 77, 85 L. Ed. 6 (1940).
>
> Although the legislative history on this issue is meager, the following interchange between Representative Barden and Hartley on the floor of the House does suggest that the type of relief contemplated under Section 301 was remedial as distinguished from punitive: "Mr. Barden. * * * It is my understanding that section [301] * * * contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances * * *."; "Mr. Hartley. The interpretation the gentleman has just given of that section is absolutely correct." 93 Cong. Rec. 3656-3657.
>
> From the foregoing it follows that the fashioning of a remedy by the United States courts in Section 301 actions, as required by Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957), does not include the power to award punitive damages." *Supra* at 284-85.

Judge Lumbard did not like the majority approach and opted for the rationale of the dissent. He ignored completely the *Dill* and *Williams* cases, decided in the 6th and 9th Circuits respectively, both of which support the *Brooks Shoe* rejection of the punitive damage concept.

His principal commentary was on three District Court cases.[29] One of them, *Wanzer,* the lower Court ultimately

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[29] *Zamora* v. *Massey-Ferguson, Inc.,* 336 F. Supp. 588 (S.D. Iowa 1972); *Patrick* v. *I.D. Packing Co.,* 308 F. Supp. 821 (S.D. Iowa 1969); *Sidney Wanzer & Sons, Inc.* v. *Milk Drivers, Local 753,* 249 F. Supp. 664 (N.D. Ill. 1966).

distinguishes because of *Wanzer's* caution that "such an award is extraordinary and should be reserved for those labor-management situations which cannot be pacified by other remedies." 249 F. Supp. at 671. Judge Lumbard acknowledged most importantly in this connection that *"there is no evidence that punitive damages are necessary to deter violations by Avco."* (Ap. 104a) (Emphasis added). The *Zamora*[29] result was predicated by the Court on the existence of a conspiracy between the company and the union in that case. There is no evidence here of conspiracy, so *Zamora* is not pertinent. *Patrick* teaches us nothing because the court merely concluded it was too early at the pre-trial motion stage to rule on the question of propriety of a punitive damage award. It observed (308 F. Supp. at page 824) that it was possible a *Wanzer* type showing could be made—but as we have seen Judge Lumbard felt *Wanzer* was inapposite. *A fortiori, Patrick* is no authority here.

The only other line of cases cited by the Court below in support of its punitive damages approach contained "gross disregard of rights" in Civil Rights matters (Ap. 105a). Racial discrimination cases as we have seen are a separate breed and patently not applicable.

The way we read the cases therefore, the lower court has acted contrary to the general trend of appellate court decisions in concluding that the "willful behavior" (Ap. 105a) of Avco warranted imposition of such an extraordinary remedy. The judge also characterized Avco's actions as "irrational" and "calculated" by the way (Ap. 105a). We do not agree they were irrational; they may have been calculated; but there is certainly no indication of willful or wanton disregard of the legalities or of individual rights *by Avco.* If you accept the Court's and Plaintiff's view of the case, you could find willfulness on the record—but it would be that of the arbitrator in show-

ing partiality and that of the union in failing to represent fairly. None of it can be ascribed to Avco.

The "open question" (Ap. 102a) as to the availability of punitive damages in an action such as this, to use Judge Lumbard's designation, should be resolved according to the prevailing Third, Sixth and Ninth Circuit Court views.

We make passing reference to the fact that the lower Court completely overlooked its obligation as a Court sitting in Connecticut to follow the conflicts of law rule of that State. Connecticut law should apply. *Teitelman* v. *Bloomstein,* 155 Conn. 653, 658 (1967). In Connecticut, the proper measure of punitive damages consists of legal fees and expenses, exclusive of taxable costs incurred by the plaintiff. *United Aircraft Corporation* v. *IAM,* 161 Conn. 79, 106 (1971). So the court did not even employ an appropriate standard under anybody's rule.

III.

The finding of lack of fair representation of plaintiff by the Union and by the attorney retained by the Union is unsupported by evidence but in any event should not be utilized as a basis for entry of judgment against Avco.

Presumably, because the money damages established by the Court below were assessed principally against Avco, and because Avco was appealing the judgment anyway, the union concluded that it was unnecessary for it to spend time, effort and money, and it allowed the judgment against it to become final. We have, however, preserved the points for consideration by this Court insofar as they are applicable to Avco.

The District Court found that Local 1010 and Attorney Burstein who had been retained by Local 1010 to represent Holodnak breached the duty of fair representation because of "arbitrary conduct in handling a mandatory grievance in a perfunctory manner" (Ap. 89a). Attorney Burstein died on February 9, 1973 which was prior to trial and before his testimony could be preserved (Ap. 633a). As a result, his view of his presentation is not available to us and we are all in the position of second guessing trial tactics of an experienced labor attorney.

At the outset we feel it fair to note that there is no complaint about the union's processing of the grievance, or its decision to retain counsel at the request of plaintiff or, for that matter, anything done by any union representative. (See admissions of Holodnak Ap. 246a). The cases cited by the trial court are therefore inapposite generally.

This union did not fail to process a grievance as in *DeArroyo* v. *Sindicato DeTrabajadores et al.*, 425 F. 2d 281 (1st Cir. 1970); nor is there a failure of *scienter* on the part of plaintiff as the result of union nonfeasance, as in, *Retana* v. *Ap't, Motel, Hotel Workers, et al.*, 453 F. 2d 1018 (9th Cir. 1972); nor did the union demonstrate through its processing procedure, as in *Griffin* v. *UAW*, 469 F. 2d 181 (4th Cir. 1972) that the union was hostile to the grievant's claim. Instead we have a conclusion by the Court below that it would have been preferable in its view if Burstein had argued that rule 19 is vague and unreasonable, that it was not intended to allow dismissal for conduct such as Holodnak's, that he should have insisted on concrete evidence of the company's reputation in the community or the employment relationships being damaged and that he should have argued it was all rhetorical hyperbole (Ap. 89a, 90a).

As we have noted, it is unfortunate that Attorney Burstein is unable to explicate his own rationale of the case. It is easy for a professional in the business to see he had one, however.

First of all, Mr. Burstein could well have assumed that the First Amendment argument was a weak one. Certainly we would agree, if that had been his thinking, that he was correct. (We hope this court will similarly conclude.) Second, Mr. Burstein was fully aware of the context in which Holodnak had acted and was fully aware of the Permanent Arbitrator's full awareness thereof. These are elements which the Court below failed to consider, as noted frequently above, and that lack of consideration led it to err on this point as well. Third in line is the point about which Judge Lumbard makes the most: Rule 19 should have been attacked as unreasonable and overbroad. That rule we remind the court forbade an employee under threat of suspension or discharge to make false, vicious or malicious statements concerning the relationship of employees with the company or to their jobs, or concerning the company's product, property, reputation or goodwill in the community. Aside from the fact that the rule had been in effect for many years, and lapse of time in labor law jargon establishes reasonableness *per se*, and aside from the further fact that the time for contest on grounds of reasonableness is when the rule is newly promulgated,[30] not many years and many contracts later, we have the authority of the U.S. Supreme Court no less, that the imposition of such a conduct regulation is reasonable.

In *Arnett* v. *Kennedy, supra* (page 39 of this brief,) the court was concerned with review of the discharge of an

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[30] See Article XVI, Section 4 concerning plant conduct rules and Article IV Section 3 concerning timely filing of complaints and grievances, Ex. 2, Ap. 390a, 394a.

employee for violation of an OEO conduct regulation which in terms and import were closely parallel to our rule 19. The Supreme Court concluded the regulation did not offend the guarantees of the First Amendment and that it authorized dismissal for speech as well as other conduct. That is as good a reason as we know for saying that the District Court's suggestion of unreasonableness of rule 19 here was incorrect.

It seems to us from a reading of the entire transcript of the arbitration proceeding that Mr. Burstein's principal purpose was to try to save Holodnak's job. That theme continues in the post hearing brief which he filed with the arbitrator and which the Court below scores for its "harsh" attitudes. The fact is that Holodnak's conduct falls in the one category in which arbitrators uniformly uphold the industrial capital punishment of discharge. Burstein's goal was to come up with a warning or suspension. He failed, but so far as we know failure by counsel in an endeavor properly undertaken does not warrant the harsh treatment accorded him by the lower court.

In sum, we feel the record does not disclose any failure on the part of the union to represent fairly, and at best demonstrates that the trial tactics of counsel for the losing side weren't successful—a fact which is obvious from the result in the first place.

But even if you agree with the second guess theory, and conclude the union did not do its job, where do we find a basis for castigation of Avco? How can such conduct of the union warrant assessment of punitive damages against Avco alone? Why does the debate over Holodnak's arbitration attorney's case handling result in charging Avco with two-thirds of Holodnak's counsel fees? Why should that conclusion as to lack of fair representation result in anything other than a money judgment against the union?

IV.

The Claims of Holodnak are Barred by the Statute of Limitations

The Second Circuit has held that the provisions of 9 U.S.C. (12) as to the time limit within which a motion to vacate must be served are mandatory. *The Hartbridge In Re North of England S.S. Co.*, 57 F. 2d 672, 673 (2d Cir. 1932). The record is clear that the award of the arbitrator in this case was filed on November 18, 1969 (Ap. 9a, 565a). Holodnak, therefore, under 9 U.S.C. (12) had three months from November 18, 1969 to serve the notice of the motion to vacate the award namely, until February 18, 1970. 2 Moore's Federal Practice, §6.04; 74 Am. Jur. 2d Time §9. The record in this case clearly demonstrates that the notice of the motion to vacate the award was not served until February 23, 1970 (Ap. 632a). See *Heidelberger* v. *Cooper,* 300 N.Y. 502, 89 N.E. 2d 21 (1949); *Riko Enterprises, Inc.* v. *Seattle Supersonics Corp.,* 357 F. Supp. 521 (S.D.N.Y. 1973).

Furthermore, the Supreme Court has held that the "timeliness of a 301 suit . . . is to be determined as a matter of federal law by reference to the appropriate state statute of limitations." *International Union* v. *Hoosier Cardinal Corporation,* 383 U.S. 696, 704, 705 (1966). In the instant case, the 301 action is properly characterized as an action to vacate an arbitrator's award, and, therefore, it is barred by the statute of limitations.

Other federal courts have applied the state statute of limitations to appeals from an arbitrator's award in actions brought under 301. See 54-420 Conn. Gen. Stat.: *UMW* v. *Jones & Laughlin Steel Corporation,* 86 LRRM 3089 (W.D.Pa. 1974); *International Brotherhood of Teamsters* v. *Motor Freight Express,* 356 F. Supp. 724 (W.D. Pa. 1973); *Abrams* v. *Carrier Corp.,* 434 F. 2d 1234 (2d Cir. 1970) F.n. No. 15; *International Union* v. *Hoosier Cardinal Corporation, supra,* at 705 F.n. No. 7.

Therefore, the judgment entered for Holodnak should be reversed and judgment entered for Avco on its second defense for the reasons set forth above.

CONCLUSION

Evident partiality of the arbitrator was the only basis found by the Court below to warrant vacation of the arbitration award. No clear evidence of bias having been established, the judgment against Avco on the first cause of action should be reversed.

Avco Corporation is a private employer and the existence of a business relationship between it and agencies of the government should not be found so to imbue its activities as to render it an agency of the government and subject to the strictures imposed on governmental units by the Bill of Rights. The lower Court's conclusion in treating of the second cause of action that the First Amendment applied to Avco in its conduct of operations at Stratford, Connecticut, should be reversed as should its consequent views that the conduct of Holodnak complained of by Avco constituted protected speech and that discharge for such conduct *per se* constituted a breach of collective bargaining agreement by Avco. In any event, the lower Court should not have interjected itself into the fact finding area best reserved for those possessing labor arbitration expertise and its decision as to whether the conduct provided a proper rule 19 basis for discharge and whether there was a breach of contract by Avco should have been left to the arbitration process.

There was no warrant in law or contract for assessment of punitive damage and counsel fees against Avco. The fact that exception was taken by the Court below to the conduct of the arbitrator and the representation capabil-

ities of the union and union counsel in the arbitration proceeding does not support judgment against Avco. Accordingly, the judgment against Avco on the third cause should be reversed.

It follows from the foregoing that the judgment of the District Court denying Holodnak reinstatement to active employment with Avco should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MICHAEL HOLODNAK, Plaintiff-Appellee vs. AVCO CORPORATION, AVCO LYCOMING DIVISION, STRATFORD, CONNECTICUT, Defendant-Appellant	CIVIL APPEAL NO. 74-2381

CERTIFICATE OF SERVICE

I hereby certify that two copies of the Defendant's Brief have been furnished by regular mail to Eugene N. Sosnoff, Esq., 35 Elm Street, New Haven, Connecticut 06510, Attorney for the Plaintiff, on the 13th day of December, 1974.

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